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## **Social Networking**

**Legal Issues Affecting Students and School Employees**

**CASE Winter Leadership Conference**

**Allen P. Taggart**

**January 21, 2010**

## **THE TECHNOLOGY**

- Text Messages
- MySpace
- Facebook
- Twitter
- Web Pages
- Blogs
- YouTube

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## STUDENT ISSUES

With the exception of *Morse et al. v. Frederick* (2007), the Supreme Court has not addressed any type of pure student First Amendment free-expression case since 1988.

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## STUDENT ISSUES

- The United States Supreme Court has never decided a student Internet-speech case.
- However, the Court has provided guidance on the First Amendment rights of students.
- *Tinker, Bethel, Hazelwood, Watts*

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## STUDENT ISSUES

### ■ ***TINKER v. DES MOINES SCHOOL DISTRICT – 1969***

- During the height of the Viet Nam war, the school district adopted a policy prohibiting students from wearing black armbands in protest of the war, and suspending students who violated the policy.
- The court held that the student's First Amendment rights had been violated.
- Students do not "shed their constitutional rights to freedom of speech and expression at the schoolhouse gate."
- The *Tinker* standard provides that school officials can censor student expression only if they can reasonably forecast that the student initiated expression will create a material interference or substantial disruption of the educational environment or invade the rights of others.
- The court also stated that school officials could not silence student expression simply because of "undifferentiated fear or apprehension."

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## STUDENT ISSUES

### ■ ***BETHEL SCHOOL DISTRICT NO. 403 v. FRASER – 1986***

- A student was disciplined for using a string of double-entendres while addressing a student assembly.
- "The freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."
- "It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."
- "The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."

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## STUDENT ISSUES

### ■ **HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER – 1988**

- A St. Louis-area high school principal ordered the removal of articles from the high school newspaper in which teenagers discussed their perspective on divorce, pregnancy, and other social issues.
- The court held that the First Amendment had not been violated.
- “Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are related to legitimate pedagogical concerns.”
- “A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”

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## STUDENT ISSUES

### ■ **WATTS v. THE UNITED STATES – 1969**

- A threshold issue involving student speech – particularly after school shootings at Columbine, Paducah, Ky. et al. – is whether student expression constitutes a “true threat.”
- “True threats” are not protected by the First Amendment. Students should be aware that threatening comments in general – on the Internet or not – could subject them not only to school discipline but also to criminal punishment.

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## STUDENT ISSUES

### ■ **MORSE v. FREDERICK – 2007**

- School disciplined a student who, at a public gathering during school hours, stood directly across the street from the school and displayed a banner that said, "Bong Hits For Jesus."
- Rejected the *Tinker* standard as the only test available to restrict student speech.
- Court found that the "speech" occurred during school hours at a school-sponsored event and could be regulated.
- Some have read *Morse* more broadly to say that off-campus speech directed at the school equals speech at school.
- Also, the court stated that "A public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."
- But, Alito and Kennedy concurrences made it clear that the decision did not provide an unrestrained license for policing off-campus expression.

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## STUDENT ISSUES

### ■ **C.R.S. 22-33-106(1)(c) and (d) – Students may be suspended or expelled for**

- Behavior on or off school property which is detrimental to the welfare or safety of other students or of school personnel, including behavior which causes a threat of physical harm to the student engaging in the behavior or to other students; and
- Serious violations in a school building or in or on school property.

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## STUDENT ISSUES

### ■ Cyber-Speech Cases

- *Emmett v. Kent School District No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000)
- *J.S. v. Bethlehem Area School District*, 569 Pa. 638 (2002)
- *Layshock v. Hermitage School District*, 496 F. Supp. 2d 587 (W.D. Pa. 2007)
- *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007)
- *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007), *aff'd* 527 F.3d 41 (2d Cir. 2008)
- *J.S. v. Blue Mountain School District*, 2007 WL 954245 (M.D. Pa. 2007)
- *Requa v. Kent School District No. 415*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007)
- *T. V. and M. K. v. Smith-Green Community School Corp.* (N.D. Ind. October 2009)

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## STUDENT ISSUES

### ***Emmett v. Kent School District No. 415* – Facts**

- Plaintiff Nick Emmett created a web page from his home with his computer entitled the “Unofficial Kentlake High School Home Page.” It included disclaimers saying it was for entertainment purposes only and that the page was not associated with the school.
- The page included obituaries and a poll of who would die next.
- The local news reported that the web page included a hit list – and the student removed the web page immediately.
- Emmett was initially expelled for intimidation, harassment, and disruption of the educational process. The expulsion was amended to a five-day suspension. He also was not allowed to participate on the basketball team during his suspension.

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## STUDENT ISSUES

### ***Emmett v. Kent School District No. 415* – Decision**

- The court held that Emmett's First Amendment rights were violated.
- The court noted that *Fraser* and *Kuhlmeier* did not apply.
- *Fraser* did not apply because the student's speech was not at a school assembly.
- *Kuhlmeier* did not apply because the speech did not occur in a school newspaper.
- The applicable standard was *Tinker*. Applying the standard to the facts in the case, the court found that the school had failed to demonstrate a material and substantial disruption.
- The court also noted that the web page was not produced in connection with any class or school project and that "although the intended audience was undoubtedly connected to the High School, the speech was entirely outside school's supervision or control."

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## STUDENT ISSUES

### ***J.S. v. Bethlehem Area School District* – Facts**

- A middle school student created his own Web site, which contained derogatory comments about his algebra teacher and the school principal.
- The site featured a picture of the teacher's head dripping with blood, showed her face morphing into Adolf Hitler, and contained the words, "Take a look at the diagram and the reasons I gave, then give me \$20.00 to help pay for the hitman."
- The teacher allegedly suffered extreme distress after learning of the site. The site also contained derogatory comments about the principal.

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## STUDENT ISSUES

### ***J.S. v. Bethlehem Area School District – Decision***

- The state high court determined that the Web site, though in extremely poor taste, was not a true threat: "We believe that the Web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm."
- It dismissed the argument that the Web page created at the student's control was off-campus speech beyond the school's jurisdiction. "We find there is a sufficient nexus between the Web site and the school campus to consider the speech as occurring on-campus."

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## STUDENT ISSUES

### ***J.S. v. Bethlehem Area School District – Decision (Con't.)***

- The court determined the speech to have occurred on-campus because the student accessed the site at school, showed it to a fellow student, and informed other students of the site. "We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech," the court said.
- According to the Pennsylvania Supreme Court, the school district could punish the student under the *Fraser* standard because the speech on the Web site was clearly vulgar and highly offensive. It could punish the student under the *Tinker* standard because the Web site caused a substantial disruption of school activities.

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## STUDENT ISSUES

### ***Layshock v. Hermitage School District – Facts***

- The case began in December 2005 when Justin Layshock and several other Hickory High School students posted parody profiles of Principal Eric Trosch on MySpace. Justin created the website at his grandmother's house. No school resources were used to create the profile but for a photograph of Trosch that Justin copied from the school's website by performing a simple "copy and paste" operation.
- Justin's answers to the questions, which appeared to be by and about Trosch, centered on the theme of "big." The answers ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other, such as, the principal likes to smoke "big blunts," drink "big kegs," and had been on a date with a "big \*\*\*\*-on." Eventually, most, if not all of the students were aware of the page. Justin was suspended from school.

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## STUDENT ISSUES

### ***Layshock v. Hermitage School District – Decision***

- The court ruled that school officials violated the student's free speech rights when they disciplined him for his off-campus parody of the principal.
- The court concluded that the weight of student speech case law favored the view "that school officials' authority over off-campus expression is much more limited than expression on school grounds."
- The court also concluded that the relevant court precedents [up to that time – 2005] analyzed student speech, whether on or off campus, in accordance with the principles set forth in *Tinker*. *Fraser* did not apply because there was no lewd or profane speech while in school.
- The court found that there was insufficient evidence of a material and substantial disruption. No classes were cancelled, no widespread disruption occurred, there was no violence or other student conduct that resulted in disciplinary action.

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## STUDENT ISSUES

### ***Wisniewski v. Board of Education – Facts***

- In April 2001, Aaron Wisniewski, an eighth-grader, used his parent's computer to send an AOL instant message (IM) to 15 members of his buddy list, some of whom were his classmates. His IM icon was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood. Beneath the drawing appeared the words, "Kill Mr. VanderMolen." Philip VanderMolen was Aaron's English teacher at the time.
- The IM was not sent to the teacher or any other school official.
- Aaron created the icon a couple of weeks after his class was instructed threats would not be tolerated by the school and would be treated as acts of violence.
- Law enforcement and an evaluating psychologist concluded that it was done as a joke and that Aaron posed no real threat. He was not prosecuted.
- Aaron was suspended for one semester.

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## STUDENT ISSUES

### ***Wisniewski v. Board of Education – Decision***

- The court declined to decide the case on the basis of whether the transmission constituted a "true threat" under *Watts*.
- The court said, "We think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows."
- "With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth [in *Tinker*]."
- The court concluded that the transmission constituted conduct that posed a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.

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## STUDENT ISSUES

### ***Doninger v. Niehoff* – Facts**

- A high school junior, angry about the possible cancellation of a student event posted the following message on her publicly accessible blog, which was hosted by livejournal.com, a website unaffiliated with the school.
  - Jamfest is cancelled due to douchebags in central office. Here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for Jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. We have so much support and we really appreciate it. However, she got pissed off and decided to just cancel the whole thing all together. And so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. and..here is the letter we sent out to parents.
- The Principal concluded that the student's conduct had failed to display the civility and good citizenship expected of class officers. She noted that the posting contained vulgar language and inaccurate information. In addition, she believed the student had disregarded her counsel regarding the proper means of addressing issues of concern with school administrators. The Principal decided that the student should be prohibited from running for Senior Class Secretary.

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## STUDENT ISSUES

### ***Doninger v. Niehoff* – Decision**

- The court held that the student's posting created a foreseeable risk of a substantial disruption to the work and discipline of the school. In reaching this decision, the court did not rely on *Fraser*, questioning whether *Fraser* could legitimately apply to off-campus speech. Instead, the court relied on *Tinker*.
- "We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus." *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007). *We are acutely attentive in this context to the need to draw a clear line between student activity that "affects matter of legitimate concern to the school community and activity that does not."*

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## STUDENT ISSUES

### ***J.S. v. Blue Mountain School District – Facts***

- The Plaintiff was a middle school student who created a personal profile from her home computer during non-school hours. The profile appeared on MySpace.com with a picture of the school principal and allegations that he was a pedophile and a sex addict. No school resources or time were used, and there is no evidence that the student displayed the contents of the web page on school grounds. In fact, MySpace was inaccessible on school computers.
- Over the next few days, the profile generated a "buzz" among the students and teachers at school – but the evidence was less than "substantial disruption." After several days the principal discovered that J.S. was responsible for creating the profile.
- As punishment for violating the school's discipline code, as well as the district's copyright policy, the principal suspended J.S. for ten days. J.S. and her parents filed suit against the district, claiming that it was prohibited from disciplining a student's out-of-school conduct as long as the conduct did not cause a disruption of school, and by doing so it had violated J.S.'s First Amendment right to free speech.

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## STUDENT ISSUES

### ***J.S. v. Blue Mountain School District – Decision***

- The court determined that the speech at issue was not political – as was the case in *Tinker* – but was instead merely vulgar and offensive. Having found the *Tinker* test not fully applicable, the district court turned to other cases addressing free speech in the school setting.
- Combining principles from *Tinker*, *Morse*, and *Fraser*, the court found that it was an appropriate function of schools to prohibit vulgar and offensive language, and that educators could limit speech so long as their actions were reasonably related to legitimate pedagogical concerns.
- The district court determined that the school may lawfully punish "vulgar, lewd, and potentially illegal speech that had an effect on campus" and where the intended audience was students at school.
- The case has been appealed.

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## STUDENT ISSUES

### ***Requa v. Kent School District No. 415 – Facts***

- During Plaintiff Gregory Requa's junior year in high school, some video footage of a teacher was taken, edited, graphics and a musical sound track added, and was posted on YouTube. The video included commentary on the teacher's hygiene and organization, and footage of a student standing behind the teacher making faces, holding two fingers up at the back of the head, and making pelvic thrusts in her general direction. A portion of the video, announced by text reading "Caution Booty Ahead," included shots of the teacher's buttocks as she bent over.
- Young Mr. Requa admitted to having posted the video from his own home. News of the story hit the local news a few months later and the video was aired. Shortly thereafter, Mr. Requa removed the video from YouTube. He was subsequently given a 40-day suspension from school.

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## STUDENT ISSUES

### ***Requa v. Kent School District No. 415 – Decision***

- The court found that the student's First Amendment rights had not been violated. First, the court found that the student had not been punished for his speech, but for his conduct – close up shots of the teacher's buttocks and pelvic thrusts in the video – which was clearly on-campus conduct.
- However, the court did analyze the First Amendment issues in the case under the *Fraser* and *Tinker* tests.
- Pursuant to *Fraser*, the court noted that the repeated footage of the teacher's buttocks with the booty rap song playing was lewd and offensive, and fell within the parameters of *Fraser*.
- Regarding *Tinker*, the court held that there was "no difficulty in concluding that one student filming one student behind a teacher making pelvic thrusts in her direction, or a student filming the buttocks of a teacher as she bends over in the classroom creates a material and substantial disruption to the work and discipline of the school."

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## STUDENT ISSUES

### ***T. V. and M. K. v. Smith-Green Community School Corp. – Facts***

- During the summer prior to the beginning of the 2009-2010 school year, T.V. and M.K. attended a sleepover with friends who were also students at Churubusco High School.
- During the sleepover the girls took pictures of themselves pretending to kiss or lick a large multi-colored novelty lollipop shaped phallus, as well as pictures of themselves in lingerie with dollar bills stuck in their clothes, as well as other pictures. There was nothing in the pictures that identified them as attending Churubusco High School or any reference to the High School.
- The students posted the pictures on their MySpace pages. The only persons who had access to the pictures were persons they had designated as "friends" on MySpace. The pictures were eventually copied and provided to school administration.
- The principal concluded that the posting of the pictures violated the athletic code of conduct. The students were suspended from all extra-curricular activities for a year. The penalty was reduced to 25% of fall semester activities after the girls completed three counseling sessions and apologized to the coaches.

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## STUDENT ISSUES

### ***T. V. and M. K. v. Smith-Green Community School Corp. – Decision***

TBD

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## STUDENT ISSUES

### Conclusions:

- Student discipline for off-campus cyber-speech is analyzed by the courts under a variety of theories.
- Discipline for threats – even when made in off-campus postings – will in most cases be upheld. (*Watts*)
- Discipline for speech that is directed at the school and advocates illegal conduct may be upheld. (*Morse*)
- The greater the nexus to school the more likely the discipline will be upheld. (*Morse* and *Fraser*)
  - Were students or teachers targeted in the speech? Was the speech “brought into the school” by the student or students? Was the speech discriminatory or harassing (and would affect a student’s or teacher’s ability to learn or work at school)?
- Discipline may be upheld where the speech has caused a substantial disruption, or it is reasonably foreseeable that the speech would create a material and substantial disruption to the work and discipline of the school. (*Tinker*)

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## STUDENT ISSUES

### Cell Phone Searches

- *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School officials need not obtain a warrant before searching a student.
  - A search is justified at its inception when there are reasonable grounds for suspecting the search of a particular student will turn up evidence that the student has violated or is violating either the law or rules of the school.
  - A search is reasonable in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.
- *United States v. Savala*, 541 F.3d 562 (5th Cir. 2008).
  - A person has a reasonable expectation of privacy in the contents of his or her personal email account and/or cell phone.
  - “Cell phones contain a wealth of private information, including emails, text messages, call histories, address books, and subscribers numbers.”

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## STUDENT ISSUES

### Cell Phone Searches (Con't.)

- *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622 (E.D. Pa. 2006).
  - A teacher confiscated a student's cell phone because he displayed it during school hours in violation of school policy.
  - Following the phone's confiscation, the teacher and the assistant principal called nine other students listed in the student's phone address book to determine if they were violating the school's cell phone policy.
  - They also accessed his text messages and voice mail, and held an IM conversation with the student's younger brother without identifying themselves. During the review of the phone's contents, they discovered a drug-related message.
  - The court held that, while the school was justified in seizing the phone, the subsequent search of the phone was illegal.
  - In calling other students, school officials were conducting a search to find evidence of other students' misconduct. They had no reason to suspect at the outset that such a search would reveal that the student himself was violating another school policy.

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## STUDENT ISSUES

### Cell Phone Searches (Con't.)

- *J.W. v. DeSoto County School District*, Case 2:09-cv-00155-MPM-DAS (N.D. Miss., Sept. 1, 2009).
- Southaven Middle School has a policy against cell phone use during school hours. In August of 2008, 12-year-old Richard Wade was discovered to be in violation of that policy after he received a text message from his father (who was traveling out of state) during "football class."
- His cell phone was confiscated by his football coaches and then searched by the principal, as well as the Southaven Police Department. At that time, authorities found what they considered to be "gang-related activity" – that is, photos of Wade and a friend dancing in the bathroom at Wade's home. The friend held a BB gun across his chest while he danced.
- Wade was suspended and then eventually expelled for having "gang signs" stored on his phone. The ACLU got involved and alleged that the football coaches, principal, and police violated Wade's constitutional rights and even acted outside of the school's policy of merely confiscating phones during school hours.
- DECISION – TBD.

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## EMPLOYEES

### Teachers Gone Wild on the Web

- "Teaching chitlins in the ghetto of Charlotte."
- "I'm feeling pissed because I hate my students."
- Tip offered to colleagues: "Teaching in DCPS – Lesson #1 – Don't smoke crack while pregnant."
- Display of a poster that depicts a talking sperm and invokes a slang term for oral sex.
- Posted photos by an art teacher of "butt art" – done by painting his private parts and pressing them onto canvas.
- "I like dancing like an \*\*\*\*hole."
- MySpace profile – "I'm an aggressive freak in bed."
- Special Education teacher Facebook "bumper sticker" that says, "You're a retard but I love you."

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## EMPLOYEES

### OFF-Duty Social Networking

- Is complaining about your job or supervisor on Facebook or Twitter any different than doing the same thing with co-workers over drinks on a Friday afternoon?
- What special circumstances exist when the employer is a public school district?
- First Amendment protections?
- Can an employer regulate or limit an employee's participation in Facebook, MySpace, Twitter, etc.?
- Can an employer "watch" an employee through their social networking sites?
- Invasion of privacy?
- What about C.R.S. 24-34-402.5 – Unlawful to terminate employees for lawful activities?

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## EMPLOYEES

### Complaining About the Boss and Customers

- A case in federal court in New Jersey pits bosses against two employees who were complaining about their workplace on an invite-only discussion group on MySpace. The case tests whether a supervisor who managed to log into the forum – and then fired employees who badmouthed supervisors and customers there – had the right to do so.
- On the forum, the employees made fun of the employer's decor and patrons, and made sexual jokes. They also made negative comments about their supervisors.
- Managers were tipped off to the discussion and asked for log in information from another employee.
- The employer fired the pair because the online posts violated policies set out in an employee handbook, which include professionalism and a positive attitude.
- In their lawsuit the employees claim that their managers illegally accessed their online communications in violation of federal wiretapping statutes and that the managers also violated their privacy under New Jersey law.
- But – is the speech really private?

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## EMPLOYEES

### Public Employees Have First Amendment Rights – But Those Rights Are Not Absolute

- Supreme Court Cases:
  - *Pickering v. Board of Ed.*, 391 U.S. 563 (1969): teacher fired for writing a letter to the editor.
  - *Connick v. Myers*, 461 U.S. 138 (1983): assistant district attorney fired for circulating a petition that asked whether other assistant DA's felt pressure to work on political campaigns.
  - *Garcetti v. Ceballos*, 547 U.S. 410 (2006): a senior deputy district attorney was transferred and passed over for promotion after he wrote an internal memo about inaccuracies in an affidavit. It was part of his job to supervise other deputy DA's and to review their work.

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## EMPLOYEES

### ***Pickering v. Board of Ed. – Decision***

Rights of the employee were violated. In public employee free speech cases the interest of the employee as a citizen commenting on matters of concern must be balanced against the interest of the employer in promoting the efficiency of the public services it performs through its employees.

### ***Connick v. Myers –***

Rights of the employee not violated. Whether assistant district attorneys are pressured to work in political campaigns was considered a matter of public concern. However, the employee's interest in speaking on a matter of public concern did not outweigh the public employer's interest in a disruption-free working environment.

### ***Garcetti v. Ceballos –***

Rights of the employee not violated. When an employee is simply performing his or her job duties through their speech, there is no need for the "public concern, nature of speech" analysis. The employee in this case was not acting as a citizen when he went about conducting his daily professional activities, such as supervising attorneys. He also did not speak as a citizen when he wrote a memo that addressed the proper disposition of a pending criminal case.

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## EMPLOYEES

### **Cases Result In A Four Step Analysis of Whether the Employer Retaliated Against the Employee In Violation of Their First Amendment Rights**

- The employee's speech must involve a matter of public concern to be protected;
- The employee's First Amendment interests must outweigh the public employer's interest in efficiency;
- The employee must have been disciplined, in substantial part, because of the protected speech; and
- The public employer must not be able to prove by a preponderance of the evidence that it would have disciplined the employee even without the protected speech (were there other legitimate, non-retaliatory reasons for the discipline).

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## EMPLOYEES

- What About Privacy?
- The Fourth Amendment provides “[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures ... .”
- Fourteenth Amendment imposes these restrictions on state and local governments. Does not affect private entities.

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## EMPLOYEES

### Privacy –

- *O'Connor v. Ortega*, 480 U.S. 709 (1987), government employer may search an employee's office for a legitimate work-related reason.
- Subject to Fourth Amendment protection if employee has a reasonable expectation of privacy.
- Expectation of privacy “may be reduced by virtue of actual official practices and procedures, or by legitimate regulation.” 480 U.S. at 717.

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## EMPLOYEES

### Expectation of Privacy Is Reduced by:

- Communicating through Social Media
  - No reasonable expectation of privacy in what is posted on a public forum may no longer be private.
- Employment Policies, Internet Use Policies
  - If the employer notifies employees that it has the right to inspect computer files or monitor computer use, the employees have no reasonable expectation of privacy with respect to those files. E.g., *U.S. v. Angevine*, 281 F.3d 1130 (10th Cir. 2002); *U.S. v. Simons*, 206 F.3d 392 (4th Cir. 2000).
  - If the government employer does not have such a policy, the employee may have a reasonable expectation of privacy. E.g., *U.S. v. Slanina*, 283 F.3d 670 (5th Cir. 2002); *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001).
  - Employer has no duty to monitor a public forum, but does have a duty to monitor and take corrective action if the media relates to the workplace. *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 2000 WL 703018 (N.J. 2000).
  - Employer, with an appropriate policy in place has the right to monitor employee email and computer use, and may have a corresponding duty.

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## EMPLOYEES

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Friend?

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## EMPLOYEES

### Recent Incidents

- Teacher fired after "grooming" students through Facebook and text messages for sexual relationship after graduation.
- An assistant football coach at a Mississippi high school was arrested and fired after allegedly sending a sexually explicit photo of himself to a female student, one of a handful of similar incidents in that state.
- A New Jersey math teacher was fired in June after two female students said he sent them inappropriate text messages in separate instances.
- In Washington, the principal of a Christian school allegedly had sex with a 14-year-old student after the two exchanged hundreds of text messages.
- Teacher in small school district fired after "friending" most of the high school students and texting student to find some marijuana for her.

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## EMPLOYEES

### Limiting Employee Participation in Social Media

- Ohio State Highway Patrol Limits Trooper's Personal Social Network Use:
  - May not post pictures of themselves or other in uniform and from using the patrol's "flying wheel" insignia
  - Prompted in part by lawsuit against the City of Philadelphia for racial discrimination and harassment stemming from a social networking site operated by some of its police officers.
- The Lamar County School Board in southern Mississippi has passed a policy that prohibits teachers from texting or communicating with students through social networking sites such as Facebook.
- The Sioux Falls School District prohibits staff from bringing unrelated students from the School District into their personal networks on sites such as Facebook. "Friending" students on pages created for professional use, however, still is OK.
- The Florida Judicial Ethics Advisory Committee has issued an opinion on judges' use of social networking sites. In short, the opinion advises judges of the following: Judges may have a personal page on Facebook or other social-networking sites and may post comments and other materials on their own pages, provided the material does not otherwise violate the Code of Judicial Conduct. A judge may *not* be "friends" with any lawyer who *may* appear before him. The opinion recognizes that being a Facebook friend does not mean that there is a friendship in the traditional sense. But, by identifying the lawyer as a "friend," the judge risks conveying that the lawyer is in a position to influence the judge. Thus creating or potentially creating, the appearance of impropriety.

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## EMPLOYEES

### **But in Colorado, what about C.R.S. 24-34-402.5?**

- It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such restriction:
  - Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
  - Is necessary to avoid a conflict of interest with any responsibilities of the employer or the appearance of a conflict of interest.

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## EMPLOYEES

### **A recent on-line poll asked "Are teacher-student friendships inappropriate on social-networking sites?"**

- Yes. The intimate, revealing nature of social-networking sites makes them an improper place for students and teachers to communicate. 29% (128 votes)
- Maybe. If they choose to be available to students who want to make an appropriate connection, teachers should create professional profiles separate from their personal pages. 28% (122 votes)
- No. As long as teachers' personal pages and communication are suitable for student viewing, social-networking sites can be used to reinforce positive teacher-student connections. 41% (176 votes)
- None of the above (Comment below.) 2% (8 votes)

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## EMPLOYEES

### MESSAGE:

**Don't Confuse Social Networking  
with Educational Networking!**

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## EMPLOYEES

### **What About Supervisor "Friending" Subordinates?**

- Choices:
  - No rules. Anyone can friend anyone and the employer won't get involved.
  - Supervisors may not make friend requests to direct reports. Direct reports may make friend requests to supervisors, in which case the supervisor has the discretion to accept (or not accept) the request.
  - Supervisors may not make friend requests to direct reports. Direct reports may not make friend requests to their supervisor. Colleagues may be friends on Facebook.

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## EMPLOYEES

### ■ Reasons To Say No To “Friending” Subordinates:

- Many employees think it's creepy – in a recent survey by Office Team, 47% of employees said they don't like seeing a friend request from their boss. Sure, that's less than half, but it's probably not worth the risk of really bothering a good performer.
- It smacks of favoritism – If anyone doesn't get a friend request from the boss, that's not going to look good.
- Managers could learn too much about their employees – which could come back to haunt the company.

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## EMPLOYEES

**Don't Be Tempted By the  
Culture of Informality**

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AND IN THE END ...

REMEMBER ...  
No matter where you go,  
there you are.

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